KEE YEH MARITIME CO LTD

v.

COASTAL SHIPPING SDN BHD

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[CIVIL APPEAL NO: S12-01-1999]
25 MAY 2000

CIVIL PROCEDURE: *Appeal - Competency of appeal - Appeal from decision of sessions judge dismissing application to strike out defence - Nature of ruling - Whether an interlocutory order or a final order - Whether appealable - Whether a "decision" under s. 3 Courts of Judicature Act 1964*

This was the appellant's appeal from the decision of the sessions judge dismissing its application to strike out the defence of the respondent. A preliminary question was raised, *ie*, whether the appeal was incompetent as it was an appeal from an interlocutory order of the sessions judge and not an appeal from a "decision" under s. 3 of the Courts of Judicature Act 1964 ('the Act').

Held:

[1] The ruling of the sessions judge dismissing the appellant's application to strike out the defence and granting the respondent unconditional leave to defend was only an interlocutory order. Therefore, it was not a "decision" under s. 3 of the Act as the rights of the parties were not fully adjudicated upon. As there should be a decision first before the appellate civil jurisdiction of the High Court could be exercised, the present appeal was therefore incompetent.

[Appeal dismissed.]

Case(s) referred to:
Bozson v. Altrincham UDC [1903] 1 KB 547 ***(refd)***
Maleb Su & Anor v. PP [1984] 1 MLJ 311 ***(refd)***
Nagappa Rengasamy Pillai v. Lim Lee Chong [1968] 2 MLJ 91 ***(refd)***
Rank Xerox (Singapore) Pte Ltd v. Ultra Marketing Pte Ltd [1992] 1 SLK 73 ***(refd)***
Sri Jaya Transport Co Ltd v. Fernandez [1970] 1 MLJ 87 ***(refd)***
Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd [1999] 3 CLJ 377 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 27, 28, 86(2)

Criminal Procedure Code, s. 307
Subordinate Courts Rules 1980, O. 14 r. 21, O. 22 r. 3, O. 49 rr. 1, 2(2), O. 53 r. 11

For the appellant - Edwin Tsen; M/s Tan Pang Tsen & Co
For the respondent - Francis Wong; M/s Peter Lo & Co

Reported by Usha Thiagarajah

[Editor's note: cf Thong Guan Construction Sdn Bhd v. Shencourt Properties Sdn Bhd at p. 244]

JUDGMENT

Richard Malanjum J:

This is an appeal by the appellant/plaintiff against the ruling by the learned Sessions Court Judge Sandakan ('SCJ') dismissing its application made under O. 14 r. 21, O. 22 r. 3 and O. 53 r. 11 of the Subordinate Courts Rules 1980 (SCR 1980) to strike out the defence of the respondent/defendant. The learned SCJ ruled that there were triable issues.

Anyway before the hearing proper could proceed a preliminary question was raised in that whether this appeal is competent in view of the meaning of the word 'decision' under s. 3 of the Courts of Judicature Act 1964 as amended ('the Act').

It is the contention of learned counsel for the respondent/defendant that in view of the ruling of the learned SCJ in dismissing the application of the appellant/plaintiff there is no question of the rights of the parties having been finally adjudicated. As such it is caught by the definition of the word 'decision' as amended and thus is no longer appealable since the appeal is made pursuant to O. 49 r. 2(2) of SCR 1980 wherein the word 'decision' appears.

Learned counsel for the appellant/plaintiff argued that s. 28 of the Act should be the only relevant provision to consider which provides the restriction as regards appeals from Subordinate Courts to the High Court. He also referred to s. 307 of the Criminal Procedure Code and the case of *Maleb Su & Anor v. PP* [1984] 1 MLJ 311. Incidentally, that case has now been overruled by the Court of Appeal in *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377.

Now, in considering the respective contentions of the parties it may be appropriate to first reproduce the relevant statutory provisions as cited.

The word 'decision' as defined in s. 3 of the Act states thus:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

And s. 28 of the Act reads:

> (1) Subject to any other written law, no appeal shall lie to the High Court from **a decision** of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less except on a question of law.
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> (2) An appeal shall lie from any decision of a subordinate court in any proceedings relating to maintenance of wives or children, irrespective of the amount involved. (Emphasis added).

Meanwhile O. 49 r. 2(2) states:

> (2) An appellant may appeal from the whole or any part of a decision and the notice of appeal shall state whether the whole or part only, and what part, of the decision is complained of.

However r. 1 of O. 49 states thus:

> In this Order 'decision' includes 'judgment', 'order' and 'decree'.

In view of the word 'decision' having been defined in the SCR 1980 I do not think the definition of that word as found in s. 3 of the Act can be imported. As such there is no merit in the contention of learned counsel for the respondent/defendant that relies on O. 49 r. 2(2) of the SCR 1980. At any rate O. 49 is not an empowering provision for the High Court to hear appeals from subordinate courts.

Meanwhile, as regards s. 28 of the Act learned counsel for the appellant/plaintiff seems to think that the restriction is only confined to a decision bearing a sum of RM10,000 or less with the exception where there is a point of law involved. Otherwise learned counsel is of the view that any decision of a subordinate court is appealable.

With respect, I think the interpretation of s. 28 of the Act as given by learned counsel for the appellant/plaintiff is too restrictive. In my view that section is more of an exception to an otherwise overall appellate jurisdiction of the High Court under the Act to hear appeals from Subordinate Courts as provided under s. 27 Part II of the Act which reads:

27. Appellate civil jurisdiction

The appellate civil jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts as hereinafter provided.

Nevertheless, before such jurisdiction can be exercised there is one important prerequisite to consider, namely, that there must exist a decision of a subordinate court being appealed against. I have come to that conclusion in view of the phrase 'as hereinafter provided' in s. 27 thereof. And in so far as s. 28 is concerned there shall be no appeal against a decision if the sum involved is RM10,000 or less except where there is point of law involved. Thus, the preliminary question to ask in this present appeal is: what is the nature of the ruling of the learned SCJ when he dismissed the application of the appellant/plaintiff? And that entails a determination whether such ruling is an interlocutory order or a final order.

Learned counsel for the respondent/defendant submitted that the ruling of the SCJ is not a final order in that the parties will still have to go for trial. Unfortunately there was no authority cited to support such a contention.

In the case of *Nagappa Rengasamy Pillai v. Lim Lee Chong* [1968] 2 MLJ 91 the issue before the then Federal Court was whether the appeal against the order of the High Court granting conditional leave to defend the action was competent since no leave was obtained from either the judge of the High Court who heard the matter or from the Federal Court. In the course of dismissing the appeal *in limine* since no leave was obtained contrary to the then s. 68(2) of the Act which read:

No appeal shall lie from an interlocutory order made by judge of a High Court in chambers unless the judge has certified, after application, within four days after the making of such order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a judge of the High Court.

His Lordship Ong Hock Thye FJ at p. 91 said this:

The point that now falls to be determined is whether the respondent's objection is valid or not. The order appealed against was manifestly an interlocutory order for the simple reason that it was not a final judgment.

The foregoing case was discussed in the Singapore case of *Rank Xerox (Singapore) Pte Ltd v. Ultra Marketing Pte Ltd* [1992] 1 SLK 73. And this is what Yong Pung How CJ said at p. 75:

Previously, there were two possible tests to be applied in deciding whether an order was interlocutory or final. The first was stated by Fry LJ in *Salaman v. Warner* [1891] 1 QB 734 at p. 736:

> ... an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or proceeding fail or succeed, determine the action. Conversely, ... an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined.

The second was the test stated by Lord Alverstone in *Bozson v. Altrincham UDC* [1903] 1 KB 547 at p. 548. This test was as follows:

> Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then ... it ought to be treated as a final order; but if it does not, it is then ... an interlocutory order.

In *Ratnam v. Cumarasamy & Anor* [1962] MLJ 330 the Court of Appeal of the Federation of Malaya carefully considered the available authorities and held that the proper test to be applied in deciding whether an order was interlocutory or final ought to be Lord Alverstone's test in *Bozson*'s case. The point was also discussed by the Federal Court in *Nagappa Rengasamy Pillai v. Lim Lee Chong* [1968] 2 MLJ 91. There, without adverting to any test, an order for conditional leave to defend was referred to as 'manifestly an interlocutory order for the simple reason that it was not a final judgment'. So far as courts in Singapore are concerned, the debate ended with *Tee Than Song Construction Co Ltd v. Kwong Kum Sun Glass Merchant* [1967] 2 MLJ 205, a decision of the Federal Court in Singapore, in which after due consideration of the authorities it was decided that Lord Alverstone's test should be adopted. It should be noted that in *Haron Mohd Zaid v. Central Securities (Holdings) Bhd* [1982] 2 MLJ 94, the Privy Council, while expressing its reluctance to overrule the domestic courts of common law jurisdictions outside the United Kingdom in matters of procedure as distinct from substantive law, went on to approve the application of the *Bozson* test in Malaysia.

Counsel for the plaintiffs contended that the reasons for the decision in *Nagappa Rengasamy Pillay v. Lim Lee Chong* were not clearly stated in that case and that the Federal Court had not applied Lord Alverstone's test in coming to the conclusion that an order for conditional leave to defend an action was an interlocutory order. Whether or not we concur with this submission does not affect our final decision because we should have agreed with the result in that case in any event: applying Lord Alverstone's test still leads us inexorably to the conclusion that an order for conditional leave to defend an action must be an interlocutory order. Counsel for the plaintiffs also contended that an order for conditional leave to defend is a final order in that it finally states the rights of the parties thus the defendant can only defend if he satisfies the condition attached to the order granting leave; otherwise the plaintiff is entitled to judgment. This argument appeared to us to be fallacious.

In our judgment the phrase 'the rights of the parties' contained in the *Bozson* test refers to the substantive rights in dispute in the particular action in which the application for summary judgment is made. When conditional leave to defend the action is given, then so long as the defendant complies with the

> condition, he has the right to a full trial on the merits, at which later time the substantive rights of the parties will be determined. All that the order for conditional leave decides is the condition subject to which the dispute on the substantive rights is allowed to proceed to trial. It does not decide any part of the substantive rights themselves.

(See also *Sri Jaya Transport Co Ltd v. Fernandez* [1970] 1 MLJ 87).

Based on principle enunciated in the aforementioned cases it is therefore obvious that in the instant case the ruling of the learned SCJ granting the respondent/defendant unconditional leave to defend the action is only an interlocutory order. It is not therefore a decision as defined under s. 3 of the Act. And as it is my view that there has to be a decision first before the appellate civil jurisdiction of the High Court may be exercised this present appeal is therefore incompetent.

In passing I note that the Court of Appeal in the case of *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd (supra)* took the approach that when considering a provision in the Act the presence or absence of the word 'decision' would make a difference. This is what his Lordship NH Chan JCA said at pp. 382:

> Unlike *Anwar*'s case, the instant appeal is a civil appeal in which s. 67(1) of the Courts of Judicature Act 1964 applies. Section 67(1) of the Act reads:
>
> 67(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from **any judgment or order** of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought. (emphasis supplied.)
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> **It is to be noted that the word "decision" is not used in s. 67(1), so that, there is no compelling reason to refer to s. 3 of the Act for its meaning as is in the case of criminal appeals**. That being so, the Court of Appeal has jurisdiction to hear appeals "from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction". The phrase "from any judgment or order" is not to be restricted to the meaning given to the word "decision" in the current version of s. 3. This is because, in s. 67, civil appeals to the Court of Appeal are from "any judgment or order" of any High Court, whereas, in the case of criminal appeals they are against "any decision" made by the High Court. There is no compelling reason to extend the meaning of the words "any judgment or order" to mean a judgment or order which would finally dispose of the rights

of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the legislature. (Emphasis added).

Meanwhile, the word 'decision' appears in s. 28 of the Act. As such its definition as given in s. 3 thereof is therefore applicable.

Accordingly, for the above reasons it is thus my judgment that this present appeal is incompetent and should therefore be dismissed *in limine*.